

IN THE MATTER OF LICENSE NO. 204900 MERCHANT MARINER'S DOCUMENT
NO. Z-851795 AND ALL OTHER SEAMAN DOCUMENTS
Issued to: JAMES D. LOUGHLIN

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1454

JAMES D. LOUGHLIN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137.30-1.

By order dated 19 July 1963, an Examiner of the United States Coast Guard conducted a hearing at Wilmington, North Carolina. He suspended Appellant's seaman documents for four months outright plus four months on twelve months' probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Pilot on board the United States SS PURE OIL under authority of the license above described, on 26 November 1961, Appellant neglected to navigate his vessel on the right side of the Big Island Upper Range of the Cape Fear River, North Carolina, a narrow channel, thereby contributing to a collision between your vessel and the barge DUMBO which was being pushed by the tug LOUISIANA III.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

By stipulation, with reservations as to the credibility of the tug's Master and deckhand, there were introduced in evidence a copy of the testimony taken at the Coast Guard casualty investigation of this matter and the resultant findings of the Investigating Officer.

The Master of the PURE OIL and Appellant testified for the defense. They stated that as the fully loaded PURE OIL proceeded at full maneuvering speed in the middle of the Big Island Upper Range in order to avoid the possibility of sheering, the tug LOUISIANA III and her tow were on their left-hand side of the channel; Appellant ordered a change of speed to slow ahead at a distance of one-half mile from the tug and sounded a two-blast whistle signal for a starboard-to-starboard passing but received no answer as the LOUISIANA III moved to her right toward mid-channel; Appellant saw the side lights on the barge "shortly before the collision" (I.

11); other signals and engine orders were given prior to the collision which occurred in line with the range on the Big Island Upper Range just before the turn to the right onto the Lower Brunswick Range.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and specification had been proved.

FINDINGS OF FACT

On 26 November 1961, Appellant was serving as Pilot on board the United States SS PURE OIL, and acting under authority of his license when his ship collided with the barge DUMBO, which was being pushed by the tug LOUISIANA III, on the Cape Fear River Channel, North Carolina, near the junction of the Big Island Upper Range and the Lower Brunswick Range. The collision occurred at 2334 in clear weather while the inbound PURE OIL was on a northerly course and the downbound tug and tow were heading south. No survivors were injured but the tug's cook was killed when a parted towing cable struck him. Damage to the two ships and the barge was minor.

As shown on Coast and Geodetic Survey Chart No. 426, this is a dredged, marked channel with a project depth of 34 feet. The outbound Lower Brunswick Range runs in a south-southeasterly direction until it meets Big Island Upper Range which extends to the southeast for about four-tenths of a mile before it ends and the Big Island Lower Range then resumes the south-southeasterly direction of the channel. Light No. 47 is at the southwesterly junction of the first two of these three channel ranges. These two ranges are 400 feet wide except opposite Light No. 47 where the channel bend has been made more gradual by extending the width to a maximum of 600 feet for a distance of about 300 yards along the northeasterly side of the normal channel limits. Consequently, the predominately mid-channel range lines shown on the chart are to the west of mid-channel in the area where the range lines for the two ranges approach each other in the wider portion of the channel.

At approximately the time of the casualty, the latest tabulated depths on Lower Brunswick Range indicated a maximum of 33.2 feet and 30.4 feet at the eastern outside quarter of this range, both at mean low water. The respective figures for the Big Island Range are 33.6 feet and 3298 feet. Heavily laden vessels usually maintain positions in the middle of the channel due to its width and depth.

Appellant boarded the PURE OIL at 2134 and had the conn at all times until the collision. This is a steam turbine tanker of 9942

gross tons, 488 feet long, and a beam of 68 feet. She was fully loaded as she proceeded up the middle of the channel at full maneuvering speed of about 12 knots on a flood tide with a current of 2 knots. Her draft was 30 feet, 4 inches forward and 29 feet, 11 inches aft. On the bridge, in addition to Appellant, were the Master, Third Mate and helmsman who was steering by ranges and courses as ordered by Appellant. There was a lookout on the bow.

The downbound tug LOUISIANA III was sighted at a distance of about four mile but Appellant did not know until the vessels were much closer to each other that the tug was pushing the DUMBO, a square-ended barge which was 195 feet in length and 40 feet wide. The LOUISIANA III is a diesel-driven tug of 53 gross tons, 55 feet in length, and 17 feet abeam. She was making about 6 knots, with her Master and deckhand (as lookout) in the pilothouse, while proceeding on the Lower Brunswick Range somewhat on their own left-hand (east) side of the channel.

Appellant kept the LOUISIANA III under observation as the PURE OIL continued at full maneuvering speed onto the Big Island Upper Range. The vessel was kept on the range line in mid-channel in order to avoid the possibility of sheering in the lesser depths of water along the eastern outside quarter of the channel. The next change of course in the channel was 25 degrees to the right to the Lower Brunswick Range. Since the tug and tow were on the latter while the PURE OIL was on the Big Island Upper Range, the bearing of the tug was off the starboard bow of the tanker. The side lights and masthead lights of the LOUISIANA III were seen from the PURE OIL.

When the PURE OIL was approximately one-half mile from the tug and tow, Appellant ordered a change of speed to slow ahead and sounded a two-blast whistle signal for a starboard-to-starboard passing. This was two minutes before the collision. Appellant then ordered 15 degrees left rudder and the order was executed by the helmsman. There was no answer to the two-blast signal. The LOUISIANA III moved closer to mid-channel as both vessels approached the bend where the channel width increased from 400 feet up to a maximum of 600 feet.

Less than a minute after the two-blast signal was sounded, the Third Mate was sent forward to let go the port anchor, the engines were ordered full astern, the rudder was put full right, and a four-blast danger signal was sounded by Appellant. Shortly thereafter, a second danger signal was sounded, the port anchor was let go, and Appellant observed the side lights of the barge DUMBO for the first time. A one-blast signal from the tug for a port-to-port passing was not heard on the bridge of the PURE OIL or reported to Appellant or the Master.

The PURE OIL was on the range line of the Big Island Upper Range, slightly to the west of the middle of the channel, when her starboard bow struck the starboard side of the bow of the square-ended barge DUMBO at an angle of approximately 45 degrees. The barge swung to her starboard causing the port and then the starboard towing cables to part. One of these cables struck the cook. The engines of the tug LOUISIANA III had been going astern since her Master had heard the danger signals sounded by the PURE OIL. The point of impact was on the Big Island Upper Range just before the turn to the right to the Lower Brunswick Range. The PURE OIL swung on her port anchor as she continued forward and stopped with her port quarter against the west bank of the channel. The barge was anchored and the Master of the LOUISIANA III sought unavailable medical attention for the cook from the PURE OIL. Both vessels then proceeded to Wilmington, North Carolina under their own power.

Appellant has no prior record.

BASES OF APPEAL

This appeal has been taken from the order imposed by the Examiner. It is contended that:

1. The sole issue is whether or not Appellant violated the Narrow Channel Rule (33 U.S. Code 210) by not navigating as far to the east or righthand side of the channel as was "safe and practicable." Violation of the rule was not proved since, due to the presence of the tug and tow on the east side of the channel, it would not have been safe and practicable to navigate the PURE OIL on the same side. The New York Co. v. THE ROBIN DONCASTER, 233 F. 2d 889,892 (3d Cir. 1956).

2. The burden of proof, by substantial evidence of a reliable and probative character, was not sustained by the Government since the finding that the tug was on her right-hand side of the channel is based solely on testimony at the investigation, by the tug's Master and deckhand (Braddy and Owens), which was influenced by their employer's counsel. Since Appellant challenged the credibility of these two witnesses, after notice to the Government, and readily available counsel of their employer was not called to rebut the inference against their credibility, the presumption is that the testimony of counsel would have been unfavorable to the Government's case. Interstate Circuit Inc. v. United States, 309 U.S. 208,226 (1939). This matter is disregarded in the Examiner's decision.

3. Appellant was denied a fair hearing and his cause was prejudiced since the Examiner substituted for the prosecution by

cross-examining witnesses and because the decision contains numerous immaterial and irrelevant findings as well as unsupported conclusion and opinions not based on the record but in some cases on the Examiner's personal experience, all of which Appellant was not on notice to defend against and had no opportunity to rebut.

In conclusion, it is respectfully submitted that the issues should be resolved on the basis of an analysis of the record and the charge and specification should be dismissed. Alternatively, a new hearing, free of prejudice, should be granted.

APPEARANCE: Deutsch, Kerrigan and Stiles of New Orleans,
 Louisiana by H. Barton William, Esquire, of Counsel

OPINION

It is agreed that the basic issue is whether Appellant violated the Narrow Channel Rule (33 U.S. Code 210) which requires vessels in narrow channels to keep to their starboard side of mid-channel "when it is safe and practicable."

The findings of fact are, for the most part, in agreement with the testimony of Appellant and the Master of the PURE OIL and, therefore, are more favorable to Appellant than the findings of the Examiner, especially with respect to the rejection of his finding that the LOUISIANA III and the barge were on their right-hand (west) side of the channel. Nevertheless, I am convinced that there is substantial evidence to support the conclusion that Appellant was negligent as alleged. This is based on the determination that Appellant was not justified in continuing to proceed in mid-channel despite the presence of the LOUISIANA III on her own left-hand (east) side of the channel.

The testimony of the tug's Master and deckhand that the tug and tow were on the west side of the channel must be discredited in favor of the testimony of Appellant and the Master of the PURE OIL that the tug was on her left-hand (east) side. The version of the tug's personnel cannot be accepted because the record definitely establishes that, when testifying at the investigation, they read from a statement prepared by counsel representing the Master of the tug LOUISIANA III. The use of identical words, by the Master and deckhand, as appear in this written statement leave no doubt concerning this point. Although the statement purports to be the Master's statement as taken down by counsel in writing and the statement is signed by the Master, the fact remains that the testimony given by these two seamen was not based on their independent recollection of what had happened the day before they testified at the investigation.

Concerning the position of the LOUISIANA III in the channel, the only other surviving crew member on the tug was the engineer and he had no knowledge about this. The Third Mate and the helmsman on the PURE OIL were not questioned on this point and the lookout stated that he could not tell because he was not familiar with the channel. This leaves only the testimony of Appellant and the Master of the PURE OIL from which to choose.

Although Appellant and the Master consistently testified that the LOUISIANA III and the barge DUMBO were to the east of mid-channel, they usually did not specify the location more definitely but stated that, as the PURE OIL approached the bend in the channel, it did not appear that there would be sufficient room to pass to the east of the tug due to the deep draft of the PURE OIL. The Master's testimony, both at the investigation on November 27, 1961 and the hearing on May 28, 1963, was simply that the tug was on the east side of the channel (I. 8, R. 70). Appellant testified at the investigation that the tug was "slightly east of the center line" (I. 12). But at the hearing, considerably later, his version was that the tug was "quite close to that...beacon on the east side of the channel" (R. 82).

It would not be unreasonable to base a determination as to the position of the tug on the testimony given by Appellant at the investigation on the day after the collision on 26 November 1961 at a time when his recollection of events was probably much better than at the hearing a year and a half later. But without making a definite finding that the LOUISIANA III was only "slightly east of the center line," this testimony lends substantial support to the helmsman's testimony at the investigation that, after sounding the two-blast signal at a distance of one-half mile, Appellant ordered 15 degrees left rudder (I. 22, 23). The helmsman of the PURE OIL testified as though he had been very attentive to his particular job of steering the ship to the exclusion of observing other things which were taking place. This is an important matter to consider in determining whether to accept his testimony which was not contradicted except by Appellant's testimony at the hearing that no action was taken to move further to the left for the intended starboard-to-starboard passing (R. 83). The latter testimony, of course, is weakened by the inconsistent statements made by Appellant, at the investigation and hearing, as to the position of the tug with respect to the middle of the channel. For these reasons the testimony of the helmsman, which was believed by the Examiner, is accepted.

Both the helmsman's testimony and Appellant's testimony at the investigation, as to the position of the tug in the channel, indicate that Appellant realized the vessels would have passed close aboard to starboard, rather than at a safe distance involving

no risk of collision, if both vessels had remained on their courses relative to mid-channel before the tug started to move closer to the middle after the left rudder order by Appellant. Consequently, this was not the type of meeting situation in a narrow channel where a passing agreement is not required when the vessels will pass well clear to the starboard of each other if they remain on their respective courses, taking into consideration the fact that in a winding channel the projected courses of the vessels to the point of meeting is the important factor rather than their temporary headings as they change courses to follow the bends of the channel. Commandant's Appeal Decision 1304.

Such conditions were present, in the cases cited on appeal by Appellant as to require no agreement by signals before proceeding to negotiate a starboard-to-starboard passing. The facts in these cases show that the narrow channels being navigated were much wider (at least 1200 feet in one case, 1000 feet and 800 feet in two others), the vessels showed each other their green side lights constantly in some of the cases, and the vessels would have passed at safe distances to starboard of each other in all these cases (300 to 400 yards, 500 feet, others not specified) if there had been no change of course by either vessel.

The present situation was entirely different from the cases cited on appeal. In view of the above discussion with respect to the position of the tug LOUISIANA III in the channel, it is my opinion that, when she was about a half mile from the PURE OIL at the time of the latter's two-blast signal, the tug and tow were closer to the middle than to the east side of the channel. The beam of the PURE OIL is 68 feet, that of the barge DUMBO is 40 feet, and the normal channel width is 400 feet. Therefore, with the PURE OIL in midchannel, they would have passed each other at a distance of less than 46 feet; or if they had passed in the bend at the maximum width of 600 feet, the distance would have been less than 96 feet. In another case involving a winding channel, when a tug and tow were sighted by another tug at three and a half miles, it was held that passing within 75 to 100 feet amounted to a "risk of collision" within the meaning of the Rules of the Road. The DAUNTLESS No. 12, 58 F. Supp. 884 (D. Pa. 1945) aff. per curiam 156 F. 2d 61 (2d Cir. 1946). Hence, the passing distance would have been too close for Appellant to proceed for a starboard passing without an agreement.

When vessels cannot pass well clear to starboard of each other in a narrow channel without some change of helm, the rigidly enforced Narrow Channel Rule requires a port-to-port passing unless this is not "safe and practicable" as a matter of necessity and not mere convenience. Under such circumstances, even a vessel in position for a starboard-to-starboard passing is guilty of

negligence contributing to a collision for continuing to proceed other than on her starboard side of a narrow channel after no assent has been received to her two-blast signal. Marshall Field and Co. v. United States, 48 F. 2d 763 (2d Cir. 1931). In such cases as the latter, the two-blast signal is merely an invitation to an agreement contrary to the required mode of passing, so a vessel may not continue on her course or maneuver for a starboard passing without an assent if a change of course is necessary for a safe passing.

In The F. A. VERDON, 127 F. 2d 421 (2d Cir. 1942), both vessels were held at fault for a collision which occurred slightly on the north side of the middle of a narrow channel even though the eastbound vessel was originally on her starboard side of the channel, the vessels were in position to pass starboard to starboard, and the westbound vessel was on her left-hand side of the channel from the beginning. The eastbound vessel sounded two blasts which was answered with a single blast. Nevertheless, she continued forward and then to her left. The court concluded that the chief cause of the trouble was disregard of the Narrow Channel Rule by both vessels.

It is my opinion that the only logical inference from all the facts is that Appellant's navigation of the PURE OIL constituted negligence which contributed to the collision. If the vessel remained "exactly...in line with the range" on Big Island Upper Range, as Appellant testified (I. 12), then the vessel went to her left of mid-channel as it widened at the bend. The evidence indicates that the tug was not so far on her left-hand side of the channel as to prevent the PURE OIL from moving to her starboard when turning on to the Big Island Upper Range and safely negotiating a port-to-port passing where the channel became wider at the junction with the Lower Brunswick Range.

the fact that Appellant admitted seeing both the side lights of the DUMBO shortly before the collision (I. 11) supports the belief that there was no great change of course by the tug to her right in order to reach the point of collision on the range line. The 45-degree angle of collision is more readily accounted for by a swing of the tug's stern to port, just prior to the collision, due to the backing of her engines.

I am not convinced that it has been shown that the PURE OIL's continued position in mid-channel was justified on the ground that there would have been a materially greater possibility of sheering if the PURE OIL had gone to her starboard side as required by the rule when it is "safe and practicable" to do so. The depth of the water along the east side of the Big Island Upper Range was only .4 feet less than the maximum depth on the Lower Brunswick Range. But

even if it was not as safe to navigate the PURE OIL on her starboard side due to her deep draft, she would not have been justified in proceeding along mid-channel without having reached an agreement with the LOUISIANA III for a starboard passing. The PENNSYLVANIAN, 139 F. 2d 478 (9th Circ. 1943).

The numerous errors complained about by Appellant, which he contends are contained in the Examiner's decision, are not considered to be so prejudicial as to require a new hearing. It is my opinion that such matters are nullified by this decision which is based on an independent analysis of the record and replaces the Examiner's decision as the final agency action in this case.

CONCLUSION

The normal method of passing a narrow channel is port to port. The courts conclude that a vessel attempting to negotiate a starboard-to-starboard passing may not proceed without an agreement to do so unless the vessels are so far to starboard of each that they will pass at a safe distance, so as to involve no risk of collision, if neither vessel changes her position relative to the width of the channel.

Therefore, it was negligent for Appellant to continue ahead with the PURE OIL in mid-channel, rather than on her starboard side, while approaching the LOUISIANA III since there was no agreement for a starboard-starboard passing and the vessels would not have passed at a safe distance to starboard of each other if they had maintained their relative positions in the winding channel.

In view of the lapse of time since this collision took place and Appellant's prior unblemished record for almost 30 years, the outright portion of the suspension will be reduced from four to two months.

ORDER

The order of the Examiner dated at Portsmouth, Virginia, on 19 July 1963, is modified to provide for an outright suspension of two (2) months with the additional suspension on probation imposed by the Examiner.

As so MODIFIED, the order is AFFIRMED.

E. J. Roland
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D. C., this 28th day of May 1964.